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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SEYMOUR JAMEEL ABDULLAH, Appellant.	2 CA-CR 2009-0115 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072576

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Seymour Abdullah was convicted of two counts of sexual assault and one count of kidnapping. The trial court sentenced him to a combination of concurrent and consecutive, enhanced, presumptive prison terms totaling 18.5 years. On appeal, Abdullah challenges his convictions on several grounds. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In 2001, Theresa A. was at home with her young daughter when Abdullah knocked at the front door, claiming to be a police officer and asking for Theresa's mother by name. Abdullah entered the house, and while Theresa was distracted by her daughter, he pulled out a gun and demanded money. After unsuccessfully searching parts of the house, he ordered Theresa to leave her daughter in the living room and took her into a bedroom, where he used duct tape to secure her hands behind her back and gag her. He then raped her, penetrating her vagina both with his fingers and his penis.

¶3 After he left, Theresa called her mother, who called the police. Police officers interviewed Theresa and took photographs of her wrists showing markings from the duct tape. She was then taken to the hospital, where she was questioned and physically examined by a sexual assault nurse who took a vaginal swab, which was later found to contain semen. Theresa subsequently worked with a police composite sketch artist to produce a drawing of the rapist, which resembled Abdullah.

¶4 In March 2004, Theresa was working at a convenience store in midtown Tucson when she recognized a customer, Abdullah, as her assailant. He told her he recognized her but could not remember from where. He gave her a business card that identified him as a private investigator. Theresa contacted police, who took the business card along with video footage from security cameras showing Abdullah in the store.

¶5 The police apparently failed to pursue these investigative leads for several years, but in May 2007 they interviewed Abdullah and collected saliva from him. Later deoxyribonucleic acid (DNA) testing confirmed the sample matched the DNA of the semen on the swab taken from Theresa. Abdullah was indicted on two counts of sexual assault, one for digital penetration and the other for penile penetration, and single counts of kidnapping, aggravated assault with a deadly weapon or dangerous instrument, and first-degree burglary. The jury was unable to reach a verdict on the aggravated assault and burglary charges but convicted Abdullah of the remaining counts. The trial court enhanced each prison term and sentenced Abdullah to consecutive, presumptive prison terms of 9.5 years for the sexual assault convictions and a concurrent, presumptive 9.5-year term for burglary. This appeal followed.

Discussion

Prior Convictions

¶6 Abdullah argues he was "improperly impeached with his prior convictions." The admission of impeachment evidence is within the sound discretion of the trial court, and we will not disturb its ruling absent an abuse of that discretion. *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994). Similarly, "the trial court has

wide discretion in deciding whether to exclude evidence of prior convictions because its prejudicial effect is greater than its probativeness on lack of credibility." *State v. Dixon*, 126 Ariz. 613, 618, 617 P.2d 779, 784 (App. 1980); *see* Ariz. R. Evid. 609.

¶7 Abdullah first contends the trial court erred in not sanitizing his 2005 prior convictions, of which there were eighteen. He had filed a motion in limine requesting that the convictions "be referred to as felony convictions, without reference to the specific nature of the crimes involved." At the hearing on his motion, the state argued that it would be "inappropriate to . . . sanitize the . . . priors because they go to . . . fraud, scheme, and artifice, forgery, and obtaining narcotics by fraud. . . . [T]hese are offenses that go directly to honesty." Although the court found that "enumerating the number of convictions would be unduly prejudicial," it allowed the state to ask Abdullah if he had, in 2005, been "convicted of some felonies involving forgery and fraudulent scheme . . . to get narcotics."

¶8 Abdullah maintains that, had the trial court precluded any reference to the specific nature of these prior convictions, "the probative value may have outweighed the prejudicial effect." However, Rule 609(a), Ariz. R. Evid., which governs the admission of evidence regarding prior felony convictions for impeachment purposes, does not mention, let alone require, that a prior conviction be sanitized. *See State v. Harrison*, 195 Ariz. 28, ¶ 23, 985 P.2d 513, 518 (App. 1998). And although the sanitizing of a prior conviction may be warranted when the offense is similar to the charged offense, that was not the case here. *See State v. Bolton*, 182 Ariz. 290, 303, 896 P.2d 830, 843 (1995) (when prior convictions similar to charged offense, court may reduce risk of prejudice by

admitting fact of prior conviction without disclosing nature of crime). We therefore are not persuaded that the court abused its discretion in admitting evidence of the nature of the convictions or that Abdullah was prejudiced unduly by their admission. *See State v. Montano*, 204 Ariz. 413, ¶ 66, 65 P.3d 61, 74 (2003).

¶9 Abdullah also argues the trial court erred in permitting the state to impeach him with a 1973 conviction from Arkansas for a robbery he apparently had committed with a gun (Arkansas conviction). Although Theresa testified Abdullah had threatened her with a gun, Abdullah testified he never had possessed a gun. The court permitted the state to use the Arkansas conviction in rebuttal and, over Abdullah's objection, the following exchange took place between the prosecutor and Abdullah:

> Q. Isn't it true . . . that you were convicted in docket 8175 Circuit Court of St. Francis, Arkansas, judgment entered August 22nd, 1973[,] for robbery[,] with a jury finding in that case that you employed a firearm in the commission of that offense?
>
> A. That's what the document says.
>
> Q. Did that happen to you?
>
> A. No . . . . The Arkansas Supreme Court reversed that reference to that weapon because I was never charged with a weapon.

¶10 "'Once a defendant has put certain activity in issue by . . . denying [it], the government is entitled to rebut by showing that the defendant has lied.'" *State v. Tovar*, 187 Ariz. 391, 393, 930 P.2d 468, 470 (App. 1996), *quoting United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993). Abdullah nonetheless contends the trial court erred by admitting evidence of the Arkansas conviction because it "was more than twenty-five

years old[,] . . . the State was allowed to establish that the conviction was for robbery[,] . . . the State's 'proof' [of the conviction] was insufficient[, and] the State deliberately baited [him] into stating that he never had possession of a gun." Abdullah's argument is cursory; it is not supported by citations of authority and is, consequently, arguably waived. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838 (insufficient argument constitutes waiver of claim); Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include concise argument containing "contentions . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

¶11 In any event, Abdullah's argument is without merit. The state's introduction of the Arkansas conviction was "not an attempt to impeach his general character for 'truthfulness or untruthfulness,' but rather a permissible means of demonstrating that [Abdullah] had lied to the jury about his previous use of a handgun." *See Tovar*, 187 Ariz. at 393, 930 P.2d at 470. Thus, the age of the conviction was irrelevant. And we are not persuaded that the allegation of an unspecified felony committed with a handgun would have been any less prejudicial than a specific allegation of robbery, or that the state's line of questioning that elicited Abdullah's claim never to have had a gun was in any way improper.

¶12 We agree the evidence was less than straightforward to establish that the offense underlying the Arkansas conviction had been committed with a gun. Although the jury in that case found that a firearm had been used in the commission of the crime, the use of a firearm had not been alleged in the indictment. *Cotton v. State*, 508 S.W.2d 738, 740 (Ark. 1974). The Arkansas Supreme Court therefore reversed that portion of

the trial court's sentence imposing an additional term of imprisonment based on the use of the firearm. *Id*. at 741. However, the court did not, as Abdullah appears to suggest, conclude that a firearm had not been used in the commission of the offense. Moreover, Abdullah denied neither the existence of the Arkansas conviction nor the fact that he had committed the offense with a gun. And as the trial court noted, because the state was not permitted to further question Abdullah with respect to the Arkansas case, his answer, albeit somewhat disingenuous, "[wa]s the only evidence in the case concerning whether he had ever possessed a weapon."[1]

Prosecutorial Misconduct

¶13 Abdullah argues his convictions should be reversed because "[p]rosecutorial misconduct occurred several times in this case." We will reverse a conviction for prosecutorial misconduct if "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), *overruled in part on other grounds by State v. Nordstrom*, 200 Ariz. 299, ¶ 25, 25 P.3d 717, 729 (2001). And, "[i]f the cumulative effect of the conduct 'so permeate[s] the entire atmosphere of the trial with unfairness that it denie[s the defendant] due process,' it can warrant reversal even if the individual instances would not

[1]Here, to support this line of questioning, the state also produced a minute entry from a prior Pima County Superior Court case that stated a gun had been used in the Arkansas case. Abdullah provides no authority to support his contention that the minute entry was insufficient to support the trial court's finding that the state had a good faith basis to pursue this line of questioning, *see United States v. McBride*, 862 F.2d 1316, 1320 (8th Cir. 1988), nor does he argue the court applied the wrong standard in permitting such questioning.

do so by themselves." *State v. Velazquez*, 216 Ariz. 300, ¶ 57, 166 P.3d 91, 103-04 (2007), *quoting State v. Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d 368, 405 (2006).

¶14 Abdullah cites only two specific instances of alleged misconduct. The first was the state's use of his Arkansas conviction to impeach his testimony that he had never possessed a gun. However, as discussed above, we find nothing improper with respect to this impeachment, much less grounds for prosecutorial misconduct. The second alleged claim of misconduct occurred after Tucson Police Detective Walker testified that he had tried to examine video footage from the convenience store to determine when Abdullah had been there but that for technical reasons he had been unable to play the videotape. During cross-examination, Abdullah apparently attempted to impeach Walker with the fact that in his investigation reports, he had not mentioned having attempted to play the tape. After the trial court denied the state's request to approach the bench, the state objected that "[t]his was disclosed previously." During a recess, Abdullah argued "it was inappropriate for the State to make a comment . . . before the jury that this had all been disclosed" because any disclosure was irrelevant to "whatever reason why it's not in his report."

¶15 However, contrary to his argument on appeal, Abdullah neither moved for a mistrial nor requested that the trial court make a ruling of any kind. And because he failed to make any objection on the ground of prosecutorial misconduct, we review only for fundamental error. *See State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Because he has failed to make any showing that the state's isolated comment on a collateral issue was

fundamental error, or even that it constituted misconduct, we find no ground for reversal on this basis.[2] *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to allege fundamental error on appeal waives argument).

Rule 20 Motion

¶16 Abdullah next argues the trial court erred in denying his motion for a judgment of acquittal, pursuant to Rule 20, Ariz. R. Crim. P., on the sexual assault charge involving digital penetration. We review the court's ruling on a Rule 20 motion for an abuse of discretion. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). A Rule 20 motion should only be granted in the absence of substantial evidence to support the conviction. *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). Substantial evidence is evidence "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will reverse only if it appears that "upon no hypothesis whatever is there sufficient evidence to support the

[2]With respect to many of the issues raised in his opening brief, Abdullah fails to relate any case law to the specific facts of this case and relies on conclusory statements in place of an argument. Here, he recites the legal standard for a finding of prosecutorial misconduct but presents no argument or authority in support of his claim that these two incidents constituted prosecutorial misconduct, either individually or cumulatively. Moreover, he has not filed a reply brief responding to the state's argument that he has thus forfeited this and other issues. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838; *see also State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (failure to file reply brief on issue presented in answering brief sufficient basis for court to reject appellant's position). Although in our discretion we address the merits of the majority of these issues, this should not be taken by counsel as an invitation to submit such minimally supported arguments to this court in the future. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include concise argument containing contentions, reasons therefor, and supporting citations of authority).

conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶17 Here, the trial court found substantial evidence had been presented establishing Abdullah had digitally penetrated Theresa. The evidence consisted of statements Theresa had made to a police officer and a sexual assault nurse shortly after the assault. Both the officer and the nurse testified Theresa had told them that her attacker had put his finger in her vagina. And although over seven years later Theresa could not recall that Abdullah had done so, she did not deny having made the statements. Thus, there was substantial evidence to support the conviction.[3] *See State v. Love*, 576 S.E.2d 709, 713 (N.C. App. 2003) (victim's recorded recollection defendant threatened her substantial and adequate to support conviction despite her trial testimony she did not recall threats).

Pre-indictment Delay

¶18 Abdullah next argues the trial court erred in denying his motion to dismiss based on pre-indictment delay. "The due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution . . . protects defendants from unreasonable delay." *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996). But "[a] person claiming a due process violation must show that the prosecution intentionally slowed

[3]It is unclear whether Abdullah is challenging the admission of these witnesses' statements on appeal; in any event, he has failed to respond to the state's assertion in its answering brief that he "does not challenge their admissibility" and cites no authority in support of such a challenge. We therefore do not reach the issue of whether the statements were admissible. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838; *Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d at 463.

proceedings to gain a tactical advantage or to harass the defendant, and that actual prejudice resulted." *Id.* We review the court's ruling "for an abuse of discretion if it involves a discretionary issue, but review constitutional and purely legal issues de novo." *State v. Allen*, 216 Ariz. 320, ¶ 11, 166 P.3d 111, 114 (App. 2007).

¶19 Although Abdullah committed the offenses in 2001, and the victim encountered him at the convenience store in 2004, he was not indicted until 2007. However, Abdullah provides no argument to support his assertion that the delay "could not have occurred for any reason other than to gain a tactical advantage." And the only arguments he offers to establish prejudice are that, because of the delay, "any potential alibi [he] might have had was long gone" and, because of technological changes, "it was impossible to view the [convenience store] video tape" at trial. However, he did not assert an alibi defense; rather, he admitted having had a sexual encounter with the victim and contended it was consensual. Similarly, Abdullah never denied going to the convenience store in question at the time Theresa testified she had seen him. Indeed, he testified that "it was not unusual for me to be in that [convenience store] or that neighborhood at all," and that, if Therese had his card, "undoubtedly I gave it to her." He was not, therefore, prejudiced. Because Abdullah has not shown the state delayed to obtain a tactical advantage or that he was prejudiced, the trial court did not err in denying his motion to dismiss for pre-indictment delay.

Motion to Suppress

¶20 Abdullah argues the trial court erred in denying his motion to suppress his statements and DNA evidence obtained by police before his indictment, which he

contends violated his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and his right to counsel. Statements made to police officers while a person is in custody are admissible only "[i]f [an] accused has been given his *Miranda* warnings and makes a voluntary, knowing, and intelligent waiver of those rights." *State v. Smith*, 193 Ariz. 452, ¶ 29, 974 P.2d 431, 438 (1999). And, pursuant to Rule 15.2(a), Ariz. R. Crim. P., a defendant, "[a]t any time after the filing of an indictment, information or complaint, . . . [is] entitled to the presence of counsel at the taking of [physical] evidence."

¶21 We review a trial court's ruling on a motion to suppress for an abuse of discretion, *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000), "consider[ing] only the evidence presented at the suppression hearing and view[ing] it in the light most favorable to upholding the trial court's factual findings," *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). At the suppression hearing, Abdullah argued that he could not have knowingly and intelligently waived his rights because the interview took place six years after the incident and he initially "ha[d] no idea what it[wa]s about." He also read aloud portions of the transcript of the interview during which he repeatedly had declined to give a DNA sample before discussing the matter with his attorney, eventually submitting to a buccal swab under protest.

¶22 In ruling on Abdullah's motion to suppress, the trial court found he had been advised of and voluntarily waived his rights pursuant to *Miranda*. Abdullah argues only that "because police did not advise him prior to questioning him as to the nature of the interrogation, any waiver of his *Miranda* rights was not completely knowing, intelligent, and voluntary." However, "a suspect's awareness of all the possible subjects

of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." *Colorado v. Spring*, 479 U.S. 564, 577 (1987).

¶23 Abdullah separately argues he was entitled to the presence of counsel during the process of his providing a DNA sample. The trial court found that, with respect to Abdullah's right to counsel, Rule 15.2 did not apply to the taking of the DNA sample because he had not yet been indicted, and he therefore did not have the right to have an attorney present. Abdullah argues, without citation to case law, that "if Rule 15.2 did not yet apply, the 6th and 14th Amendments to the Constitution always apply, as does Article II, § 24 of the Arizona Constitution." To the extent he is suggesting the process of collecting his DNA sample was a critical stage of the criminal proceeding at which he was entitled to the presence of counsel, Abdullah is mistaken. *State v. Moody*, 208 Ariz. 424, ¶ 65, 94 P.3d 1119, 1140 (2004) (right to counsel attaches at critical stages of criminal process). "The taking of non-testimonial physical evidence . . . is not a critical stage of the proceedings." *Id.* And we have found no authority to support a broader interpretation of Arizona's right to counsel than the federal right. *State v. Transon*, 186 Ariz. 482, 485, 924 P.2d 486, 489 (App. 1996). The court therefore did not err in denying Abdullah's motion to suppress.

Disposition

¶24 For the reasons stated above, we affirm Abdullah's convictions.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge